

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

MARTIN CHARLES JONES v. HOWARD CARLTON, WARDEN

**Appeal from the Criminal Court for Johnson County
No. 5252 Lynn W. Brown, Judge**

No. E2008-01737-CCA-R3-HC - Filed December 11, 2008

The petitioner, Martin Charles Jones, appeals from the trial court's order dismissing his petition for a writ of habeas corpus. The State has filed a motion requesting that this court dismiss the appeal for failure to file timely a notice of appeal or, in the alternative, affirm the trial court's order pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. Upon full consideration and a waiver of the timely filing of the notice of appeal, we conclude that the petition fails to establish a cognizable claim for habeas corpus relief. Accordingly, the State's motion is granted and the judgment of the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed
Pursuant to Rule 20, Rules of the Court of Criminal Appeals.**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Martin Charles Jones, Mountain City, Tennessee, Pro Se.

Robert E. Cooper, Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

On October 15, 1999, the petitioner entered guilty pleas to nine counts of criminal exposure to HIV and three counts of statutory rape for which the trial court imposed an effective sentence of seventeen years as a Range I, standard offender. On direct appeal, this court affirmed the convictions and sentences. State v. Martin Charles Jones, E1999-01296-CCA-R3-CD, 2001 WL 30198 (Tenn. Crim. App. Jan. 12, 2001), app. denied (Tenn. Sept. 10, 2001).

On May 8, 2008, the petitioner filed a petition for a writ of habeas corpus in which he challenged the convictions in two of the counts of criminal exposure to HIV and one of the counts of statutory rape. The petitioner asserted that the trial court enhanced his sentences in violation of his Sixth Amendment right to jury trial. On June 27, 2008, the trial court dismissed the petition upon finding that it failed to establish either a void judgment or an expired sentence. The record reflects that the petitioner filed a notice of appeal on July 29, 2008.

Initially, the State asks this court to dismiss the instant appeal due to the petitioner's failure to file timely his notice of appeal. Rule 4(a) of the Tennessee Rules of Appellate Procedure requires the filing of a notice of appeal within thirty days of the entry of judgment or, pursuant to Rule 4(e), the entry of an order denying motion for new trial. However, the timely filing of a notice of appeal is not a prerequisite to the jurisdiction of this court, and this court may waive the requirement in the interest of justice. Tenn. R. App. P. 4(a). The record reflects that the order summarily dismissing the petition was filed on Friday, June 27. Thirty days from the filing of the court's order was Sunday, July 27; therefore the notice of appeal should have been filed no later than Monday, July 28. See Tenn. R. App. P. 20(a). However, the record reveals that the notice of appeal was filed one day late on Tuesday, July 29. In the interest of justice, we conclude that the requirement of a timely filed notice of appeal should be waived.

Turning to the substantive issue presented in this case, we are cognizant that in Tennessee, the grounds upon which habeas corpus relief may be granted are very narrow. Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). The writ will issue only when the petitioner has established a lack of jurisdiction for the order of confinement or that he is otherwise entitled to immediate release because of the expiration of his sentence. See Ussery v. Avery, 222 Tenn. 50, 432 S.W.2d 656 (1968); State ex rel. Wade v. Norvell, 1 Tenn. Crim. App. 447, 443 S.W.2d 839 (1969). The purpose of the habeas corpus petition is to contest a void, not merely a voidable, judgment. State ex rel. Newsome v. Henderson, 424 S.W.2d 186, 189 (1969). A void, as opposed to a voidable, judgment is "one that is facially invalid because the court did not have the statutory authority to render such judgment." See Summers v. State, 212 S.W.3d 251, 256 (Tenn. 2007). A petitioner bears the burden of establishing a void judgment or illegal confinement by a preponderance of the evidence. See Wyatt v. State, 24 S.W.3d 319, 322 (Tenn. 2000). A court may summarily dismiss a petition for habeas corpus relief, without the appointment of counsel and without an evidentiary hearing, if the petition does not state a cognizable claim. See Hickman v. State, 153 S.W.3d 16, 20 (Tenn. 2004).

In Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), the Supreme Court held that any fact other than that of a prior conviction used to enhance a defendant's sentence must be proven to a jury beyond a reasonable doubt. Blakely, 542 U.S. at 301, 124 S. Ct. at 2536. The petitioner's claim of an erroneously enhanced sentence is not cognizable in a habeas corpus case because the claim, even if proven, would render the judgment voidable, not void. See Ulysses Richardson v. State, No. W2006-01856-CCA-R3-PC, 2007WL1515162, at *3 (Tenn. Crim. App. May 24, 2007)(stating that "even a valid Blakely claim renders a conviction voidable, not void, and is thus non-cognizable in habeas corpus review"), app. denied (Tenn. Sept. 17, 2007). Additionally, this Court has repeatedly held that Blakely and its progeny did not create a new rule of law entitled to retroactive application in the context of a collateral, habeas corpus proceeding. See, e.g., Gary Wallace v. State, No. W2007-01949-CCA-R3-CO, 2008WL2687698, at *2 (Tenn. Crim. App. Jul. 2, 2008); Billy Merle Meeks v. Ricky J. Bell, Warden, No. M2005-00626-CCA-R3-HC, 2007WL4116486, at *7 (Tenn. Crim. App. Apr. 7, 2008) Glen Cook v. State, No. W2006-01514-CCA-R3-PC, 2008 WL 821532, at *10 (Tenn. Crim. App. Mar. 27, 2008). The petitioner has stated neither a claim of a void judgment, that is, one that the trial court was without

authority to enter, nor one of an expired sentence. The trial court properly dismissed the petition.

Upon due consideration of the pleadings, the record, and the applicable law, the court concludes that the petitioner has not established that he is entitled to habeas corpus relief. Accordingly, the State's motion is granted. The judgment of the trial court is affirmed in accordance with Rule 20, Rules of the Court of Criminal Appeals.

D. KELLY THOMAS, JR., JUDGE